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IN THE

Supreme Court of the United States

October Term, 1964

No. 901

JOEY GOLD and NEW YORK TICKET BROKERS, INC., on behalf of itself and its members,
Appellants,

v.

JOSEPH C. DiCARLO, as Commissioner of Licenses of the City of New York, and LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of a statutory three-judge District Court for the Southern District of New York which judgment dismissed appellants' complaint seeking to enjoin the enforcement of New York General Business Law §169-c and to declare said state statute to be in violation of the Fourteenth Amendment to the United States Constitution. This statement is sub-

mitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is hereby presented.

Opinion Below

The opinion of the court below is reported at 235 F. Supp. 817 (S. D. N. Y. 1964). Said opinion and the judgment appealed from are appended hereto as Appendix A.

Question Presented

Whether the statutory limitation of $1.50 (plus taxes) as the maximum fee which may be charged by ticket brokers upon resale of tickets to places of public amusement, as provided by the General Business Law of New York, violates the rights of brokers under the provisions of Section 1 of the Fourteenth Amendment to the United States Constitution, where the basic ticket price is uncontrolled and variable at the will of the producer or promoter of such events, since, in such case, the provisions of the act are not reasonably and substantially related to the accomplishment of its stated objective of controlling prices paid for admission by the public to such places, and whether *Tyson & Bro.* v. *Banton*, 273 U. S. 418 (1927) holding such a statute unconstitutional should be overruled?

Jurisdiction

This proceeding was brought pursuant to 28 U. S. C. §§2201, 2202, 2281 and 2284 to enjoin the enforcement of New York General Business Law §169-c and to declare said state statute in violation of the Fourteenth Amend-

ment of the Constitution of the United States. Judgment distnissing the complaint was made and entered on November 20, 1964. No application for rehearing was made. Notice of Appeal was filed in the District Court on December 18, 1964. The jurisdiction of the Supreme Court to review the judgment appealed from by direct appeal is conferred by 28 U. S. C. §1253.

Statutes Involved

New York General Business Law §§167, 169-c. United States Constitution, Fourteenth Amendment §1. The text of the foregoing statutes are set forth at length in Appendix B.

Statement of the Case

Appellants are Joey Gold, a licensed New York City ticket broker, and New York Ticket Brokers, Inc., a membership corporation composed of ticket brokers within New York City. Appellant membership corporation, by the terms of its charter, is obligated to promote and protect the interests of its membership, and has brought this class action on behalf of its members.

Article X-B of the General Business Law of the State of New York regulates in various ways the sale and distribution of theatre tickets as well as tickets to sporting events and other places of amusement or entertainment. Among the things regulated are resales of tickets by ticket brokers. The opening section of that article (Section 167) states that there is a public interest in "the price of or charge for admission to theatres, places of amusement or entertainment or other places where public exhibitions, games, contests or performances are held" and that the public should be safeguarded, among other

things from exorbitant rates. Section 169-c of Article X-B provides in effect that the theatre ticket broker may not charge a fee in excess of $1.50 for the resale of any ticket to any theatre, sporting event or other place of amusement. There is no other price control provision in the statute; only the fee upon resale of a ticket by a broker is fixed. The price charged by any producer or promoter of an entertainment or event is in no way controlled or limited.

The business of the ticket broker consists in obtaining for, and selling to, his clients who desire the convenience of such services, tickets for various events. He obtains some of such tickets by allotment from theatres but in most cases purchases them from the box office if they are available there, very often, as the Court below pointed out, being required to pay a premium in order to obtain them. He may also acquire tickets from other theatre ticket brokers who may have them in cases where the box office does not. The ticket broker's business has traditionally been an integral part of the amusement industry with the broker furnishing not only services in locating and obtaining tickets but in having them delivered, extending credit by way of charge accounts, and other minor services.

Prior to the commencement of this action, the Attorney-General of the State of New York commenced, and is still continuing, an investigation and public hearings into the theatre as a whole including the business of theatre ticket brokers. He has subpoenaed the books and records of ticket brokers, has required their attendance both at private and public hearings, has called their employees and has subpoenaed records of ticket brokers' customers as well as the customers themselves. During, and partly as a result of, these investigations he has purported to have discovered violations of law by the plaintiff Gold, as well as other ticket brokers, in that they violated the

provisions of New York General Business Law §169-c by charging a fee in excess of $1.50 per ticket in reselling tickets of admission, and has referred such cases to the District Attorney of the County of New York for prosecution and to the License Commissioner of the City of New York for proceedings looking toward either the revocation of such ticket brokers' licenses or other disciplinary action. The District Attorney has commenced prosecution of a number of theatre ticket brokers including plaintiff Joey Gold and other ticket brokers who are members of plaintiff New York Ticket Brokers, Inc.; and the defendant Joseph C. DiCarlo, License Commissioner of the City of New York, has instituted and is continuing proceedings looking toward the revocation of the licenses of the plaintiff Joey Gold as well as other ticket brokers who are members of New York Ticket Brokers, Inc. for violations of Section 169-c. These acts pre-suppose the constitutionality of that section, and, if it is held unconstitutional, the defendants will, of course, be enjoined from interfering with the business of the ticket broker, at least insofar as his fee for reselling a ticket is concerned. The three-judge court below held that upon these facts there is a justiciable controversy.

The Questions Are Substantial

The issues in this case are substantial both from the point of view of having a wide public impact and of the constitutional questions involved.

As the opinion of the court below, as well as extensive newspaper coverage, indicates, wide-scale investigations of theatre ticket distribution are being conducted in the City of New York by the Attorney General of the State, the New York City License Commissioner and the District

Attorney. The business of the ticket broker has been disrupted by the publicity attendant upon these investigations and by the interference with his business and customers. In addition, prosecutions have been instituted by the District Attorney against the plaintiff Gold as well as many other theatre ticket brokers covered by this class action. Proceedings have also been instituted by the License Commissioner looking toward disciplinary action against many theatre ticket brokers including the plaintiff Gold. The matter is of widespread concern to the American theatre, which is really synonymous with the New York theatre, as well as to the public.

It has already been held that the constitutional issue presented in this case is a substantial one. On September 29, 1964, plaintiffs moved in the United States District Court for the Southern District of New York asking for the convening of a three-judge constitutional court to hear the issues now before us. The principal issue before the district judge on that motion was whether or not there was such a substantial constitutional issue as to require the convening of a statutory court. The district court decided that motion in favor of plaintiffs on October 8, 1964, and the statutory court was accordingly convened and thereafter heard the case. The statutory court, from whose judgment this appeal is taken, also stated in its opinion that the complaint raised a substantial federal question.

The constitutionality of the price fixing provisions of the statute involved is attacked upon two separate grounds.

1. A similar provision in a prior New York statute which limited the fee which the theatre ticket broker could charge for the resale of tickets of admission to theatres, sporting events or other places of amusement, was declared

unconstitutional in the case of *Tyson & Bro.* v. *Banton*, 273 U. S. 418 (1927). This case has never been overruled. Plaintiffs concede that since that decision in 1927, the doctrine upon which it was based has been substantially eroded and that this Court in recent years has re-defined the limitations on the power of a state to fix prices and regulate business to such an extent that few such restrictions remain. Undoubtedly, in any new case arising, which might involve the power of a state to fix prices, *Tyson & Bro.* v. *Banton*, would no longer be controlling authority. However, with respect to the specific decision on the facts of that case, *Tyson* still stands, and the question remains: Should it be overruled with respect to the situation for which it was written?

This is illustrated graphically by the so-called "baseball" cases. In 1922 this Court in *Federal Baseball Club* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, held that organized baseball did not involve trade or commerce and was not within the purview of the anti-trust laws. In the 30 years following that decision, grave doubts were cast upon the validity of its doctrine, not only because of the change in the nature of professional baseball resulting in part from its purchase of materials in interstate commerce and its use of radio and television to expand its audiences beyond state lines, but also because intervening decisions such as *Gardella* v. *Chandler*, 172 F. 2d 402 (2nd Cir. 1949), had cast doubt on the continued viability of the legal doctrine enunciated in the 1922 opinion. In addition, the courts had decided in numerous other cases, including those involving sports such as professional football and hockey, organized along lines similar to those of professional baseball, that they were commerce and that they came within the purview of the anti-trust laws. It is not surprising, therefore, that in *Kowalski* v. *Chandler*, 202 F. 2d 413 (6th Cir. 1953), the Court of Ap-

peals was urged to disregard the 1922 decision of this Court upon grounds similar to those urged by the defendants here. It was pointed out that the 1922 decision was an old one, that a long line of subsequent decisions had in effect robbed it of force, and that it should be disregarded by the Court of Appeals. The Court of Appeals refused to do so under the rule for which plaintiffs here contend. In the Ninth Circuit in a parallel case decided in 1952, *Toolson* v. *New York Yankees*, 200 F. 2d 198, the Court of Appeals also took this view; namely, that the Supreme Court alone should determine whether it wished to overrule its own prior decision in *Federal Baseball Club*.

The wisdom of this course was demonstrated when this Court did, in fact, affirm its prior 1922 decision, *per curiam*, notwithstanding intervening cases to the contrary. [*Toolson* v. *New York Yankees*, 346 U. S. 356 (1953).]

There are two aspects of a decision. The judgment or actual result, which disposes of a specific dispute on its facts; and the opinion, which not only discusses the reasons for the decision but has the wider effect of becoming part of the body of law on the points involved.

It is entirely possible that this Court might change its philosophy in an area of law and proclaim that a different general doctrine prevails, but at the same time continue to like the actual result which it achieved in a given situation.

Actually, there is substantial reason for hoping that this Court will once again, in this case, as in the "baseball" cases, reaffirm its former decision, for, like baseball, the theatre is *sui generis*, a combination of business, art and entertainment holding a unique place in American life. We may also consider in this aspect of weighing possibilities, the recent drift in the opinion of the Attor-

ney General of the State of New York with respect to the wisdom of the statute before us as indicated in his statement appearing in the New York *Times* of October 8, 1964, which statement is set forth in Appendix C.

2. An additional and more compelling reason appears for holding this statute unconstitutional. Power to legislate is not enough. This Court is also concerned with the manner of the exercise of that power. The test of constitutionality is not restricted to the question of the right of the state to legislate and regulate; also under scrutiny is the means chosen for the accomplishment of the legislative objective, and if the means chosen fail to meet the test of reasonableness, the statute is unconstitutional. In *Toomer* v. *Witsell*, 334 U. S. 385 (1948), this Court said, at page 394:

> "It does not follow from the existence of the power to regulate, however, that such power need not be exercised within the confines of generally applicable constitutional limitations. In the view we take, the heart of this case is whether South Carolina's admitted power has been so exercised."

And at page 396:

> "Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them."

Apart from the question of the power of the state to legislate in a given area, a statute in order to be constitutional must meet the test of reasonableness. That is, the provisions of the statute must be reasonably and substantially related to the legislative purpose to be accomplished; they must be relevant to the achievement of the legislative objective.

This doctrine has been clearly stated and would appear to be settled law. The principle has been reaffirmed, both in cases upholding the validity of statutes and in those finding them invalid. In *Nebbia* v. *New York*, 291 U. S. 502 (1934), the leading case on present tests of constitutionality, which has been followed consistently, this Court set forth the standard in the following terms:

> "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied * * *."

In *Morey* v. *Doud*, 354 U. S. 457 (1957), the Court said, at page 465, "On the other hand a statutory discrimination must be based on differences that are reasonably related to the purposes of the act in which it is found." And later, on page 469, it gave as one of the reasons for its decision in striking out a statute as unreasonable and discriminatory, "the remote relationship of the statutory classification to the act's purpose * * *."

In the recent case of *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590 (1962), the Court said, at pages 594-5:

> "The classic statement of the rule in *Lawton* v. *Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 14 S. Ct. 499 (1894), is still valid today:
>
> "'To justify the State in * * * interposing its authority in behalf of the public, it must appear, first, that the interests of the public * * * require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'"

See also *Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483, 491 (1955); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 186 (1950); *Tot* v. *U. S.*, 319 U. S. 463 (1943).

In *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522 (1958), the Court said, at page 527, with respect to classification for tax purposes:

> "The rule has often been stated that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'"

In *Asbury Hospital* v. *Cass County*, 326 U. S. 207 (1945), the Court said, at page 214:

> "The legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose."

The statute here under attack fails to meet this test. The legislature has declared that the matter of public interest with which it is concerned in enacting this statute is "the price of or charge for admission" to theatres, sporting events and other places of amusement. Assuming abuses in ticket distribution which needed correction, the legislature could have chosen to meet the problem by declaring that brokers' fees were the cause of the abuse and that to correct this, it was enacting legislation to fix their fees for the resale of tickets. But it did not do so. Faced with evidence of certain abuses, the legislature decided that the way to eliminate them was to control the price ultimately paid by the public for admission and to prevent its becoming exorbitant. It had the power to make that choice; namely, to choose the broader objective of controlling the ultimate price paid for admission and this is the clearly stated purpose of the legislation.

But the provisions of the law enacted to accomplish this purpose do not accomplish it, cannot reasonably be expected to do so, and instead merely impose an unjustified and discriminatory burden upon a certain class: namely, the ticket brokers, who are only one of several groups of businessmen in the entertainment field whose combined activities and charges determine the price of admission to the public.

The sports promoter, theatrical producer, or theatre operator is not controlled in any way, and he may and does change and raise his prices from time to time, as he wills. Upon occasion, these changes are marked and violent and indicate that the control of the premium at which a ticket broker may resell a ticket of admission not only does not (if his fee is the sole price regulated) control the price paid for admission but frequently actually constitutes an insignificant part of it. The classic case is one which occurs in the sports field where, for example, a prize fight promoter, who normally charges eight to ten dollars for a ticket to a prize fight, may suddenly, if he feels that there is sufficient public demand for a particular event, charge twenty-five or thirty dollars, and occasionally, as in recent instances, as much as one or two hundred dollars per ticket.

It seems obvious that if the object of public interest is the price paid for admission (and this the legislature has stated), then the provisions of the statute do not accomplish this, and are accordingly discriminatory and unconstitutional. As long as we permit an important, and perhaps the most important, element of the price of admissions to remain uncontrolled, we are obviously not effecting the purpose of the statute by controlling ticket brokers' fees. All we are doing is saying that we do not want ticket brokers to make more than a certain amount of money.

Extremely important in this connection is a ruling of the Office of Price Stabilization issued in 1951 [General Overriding Regulation 14, Amendment 3, (November 5, 1951)], a copy of which is appended hereto as Appendix D. The Office of Price Stabilization came to a conclusion similar to that urged here. The price control statute itself exempted real estate sales from controls. Because of this the real estate brokers requested an amendment to the OPS regulations exempting their fees from price control regulation, upon the ground, among others, that, since the price of real estate was not controlled, there was no purpose in controlling real estate brokers' fees, since this in itself would not accomplish any meaningful control of the price to the purchaser. The Office of Price Stabilization agreed with this and issued an order exempting brokers' fees upon this ground. This finding by a government agency whose function it was to control prices and to effectively determine and regulate the manner in which this should be done, is entitled to weight as a finding by an agency expert in the field, that the position taken by plaintiffs herein is substantially correct. A reading of the ruling makes this clear.

It thus appears that the provisions of Section 169-c obviously fail to accomplish the legislative purpose as expressly stated in Section 167 and, accordingly, fail to meet present constitutional tests as to reasonableness: namely, a substantial and reasonable relationship between the objective to be accomplished and the means provided therefor. It is therefore void, and it is also void as discriminatory against a particular group: namely, the ticket brokers, who, alone among those whose activities taken together establish the price paid for admission, are restricted in the fee which they may charge.

We need not, at this time, go into the question of whether or not, if a state legislature decided that the

ticket broker business in and of itself, required price fixing legislation, it would have the power to so regulate that business. It is sufficient to point out that this statute does not purport to do that. It has a different stated purpose and that purpose is not met by the provisions made for its accomplishment.

Since the statute before us fails to meet the test of reasonableness, it must on this ground alone be held unconstitutional.

Respectfully submitted,

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APPENDIX A

Opinion and Judgment of District Court

Opinion of the Court Below

KAUFMAN, *Circuit Judge*

Plaintiffs squarely challenge the constitutionality of a New York statute regulating the price at which licensed brokers may re-sell tickets to theatres and other places of public amusement. General Business Law, Art. X-B, Section 169-c. In the face of recent widely-publicized investigations in this area and a long history of legislative concern, Joey Gold, a licensed ticket broker, and New York Ticket Brokers, Inc., a membership corporation of licensed brokers, have brought this class action against the New York City Commissioner of Licenses, Joseph C. DiCarlo, and the State Attorney-General, Louis J. Lefkowitz. They seek to enjoin the defendants from enforcing or attempting to enforce Section 169-c against ticket brokers and also a declaratory judgment that the statute is unconstitutional under the Fourteenth Amendment of the Federal Constitution.

Section 169-c of the New York General Business Law makes it unlawful to re-sell a ticket to a public amusement event at a price more than $1.50, plus lawful taxes, in excess of the maximum price printed on the ticket. The legislative purpose, expressed in Section 167, declares that the admission price for public amusements is "a matter affected with a public interest" and subject to supervision to safeguard the public against fraud, extortion, exorbitant rates and similar abuses.

This three-judge District Court was convened pursuant to 28 U. S. C. §2284 because the complaint raised a "substantial federal question," under 28 U. S. C. §2281, particularly since the predecessor of Section 169-c was declared unconstitutional in 1927 by a closely divided United States Supreme Court in *Tyson & Brother* v. *Banton*, 273 U. S. 418, which has never been explicitly overruled.

We hold that the purpose of Section 169-c is within the power of the New York legislature and that the means chosen to effect that purpose—the regulation of ticket brokers' re-sale prices—are reasonable and constitutional. Accordingly, the request for equitable relief against the state and city enforcement machinery must be denied.

We note, at the outset, that the complaint presents a justiciable controversy. On May 18, 1964, Gold was arraigned in New York City Criminal Court on a 39-count information charging violations of Section 169-c. Previously, he had been summoned by the Commissioner of Licenses to show cause why his license should not be suspended or revoked, in part because of alleged violations of Section 169-c. And the Commissioner admits that he is investigating the activities of ticket brokers generally, whom plaintiffs represent in this class action. Because the brokers are under the cloud of imminent investigation and perhaps prosecution, this case is riper for adjudication than the controversy presented by *Idlewild Bon Voyage Corp.* v. *Epstein*, 370 U. S. 713 (1962). There jurisdiction was taken although the plaintiff had simply been informed by the State Liquor Authority that its business was illegal under state law.

Turning then to the merits, *Tyson & Brother* v. *Banton* is only an illusory barrier. The Supreme Court there held that the state lacked power to regulate re-sale prices of theatre and sports tickets because they were not deemed

by the Court to be matters "affected with a public interest." But Justice Stone, dissenting, recognized that this approach only begged the question for it simply meant that only those businesses, regulation of which was countenanced by the Court, would be deemed to be affected with a public interest. 273 U. S. at 451. Justice Holmes, also dissented and proposed the much sounder standard that, subject to constitutionally required compensation, a state legislature may regulate any business when it has sufficient force of public opinion behind it. 273 U. S. at 446.

Tyson's fictional test was soon thereafter rejected in *Nebbia* v. *New York*, 291 U. S. 502 (1934), where the Supreme Court upheld against constitutional challenge a state statute fixing the minimum and maximum retail prices of milk. The Court declared that "the guaranty of due process * * * demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." 291 U. S. at 525. In truth, the *Tyson* test was obsolescent even when pronounced in 1927. The *Nebbia* standard portended increased deference by the Court to the growing need for governmental regulation in America's burgeoning industrial society.

Nebbia's approach was reaffirmed in *Olsen* v. *Nebraska*, 313 U. S. 236 (1941), which upheld a statute regulating the fees charged by employment agencies. The Court there stated, in effect, that *Tyson's* standard had been discarded, 313 U. S. at 244. And, most recently, in *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963), Justice Black not only declared that *Tyson's* philosophy had been abandoned, but quoted the rationale of Justice Holmes' dissent in that case with approval. We would be abdicating our

judicial responsibility if we waited for the Supreme Court to use the express words "We hereby overrule *Tyson*," as the plaintiffs contend we should, before recognizing that the case is no longer binding precedent but simply a relic for the constitutional historians. Judges do not have such mechanical or wooden attitudes nor are they devoid of all powers of interpretation, analogy and application of constitutional principles; they and the law must keep pace with our vibrant and dynamic society and the changes in the law which the courts have pronounced.

The ticket brokers contend, however, that the merits of the *Tyson* decision may not be challenged here since, under principles of *res judicata*, the Attorney-General is bound by *Tyson's* holding that New York may not regulate the re-sale price of tickets to public amusements. Quite apart from questions whether *res judicata* is applicable to successor Attorneys-General and whether it is properly invoked by a third party affirmatively rather than defensively, the *res judicata* argument must fall because the philosophy of *Tyson* has been so completely repudiated. At least in the constitutional area, the considerations of finality that stand behind the *res judicata* doctrine must be balanced against and oftimes give way to government's need to regulate abuses that change with the passage of time. See *Kelly-Sullivan, Inc.* v. *Moss*, 174 Misc. 1098, 1107, *aff'd*, 260 App. Div. 921 (1940); *cf. Commissioner* v. *Sunnen*, 333 U. S. 591, 599-601 (1948); 39 Ops. Atty. Gen. 22 (U. S. 1937). It would surely be anomalous to hold that forty-nine states have constitutional power to curb grave abuses in the entertainment industry, but that New York—the entertainment capital of the nation—must stand by idly because of the force of an antiquated, legally unsound decision.

So we come to the ultimate question—is the resale price limitation of 169-c unconstitutional under the Fourteenth

Amendment? The test of constitutionality is whether the method of regulation embodied in the statute bears a rational relation to a constitutionally permissible objective. *Ferguson* v. *Skrupa*, 372 U. S. 726, 733 (1963) (Harlan, J., concurring). In applying the Fourteenth Amendment we must simply determine whether circumstances vindicate the challenged statute as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. The courts no longer resort to the due process clause as a weapon "to strike down state laws, regulatory of business * * * conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955).

The ticket brokers urge upon us that Section 169-c is not reasonably related to the legislative purpose expressed in Section 167. They claim that effective price control clearly is not and cannot be expected to be achieved solely by a limitation of their fees, without any restriction on the promoter's or producer's principal charge. But we read the declaration of Section 167 that the admission prices for public amusements are a matter of public interest as an expression of the legislature's concern with the price the public must *ultimately* pay, absent fraudulent manipulations, which of course permits regulation of brokers' resale prices. If the legislature thought that such regulation was sufficient to accomplish its objective, it is not for us to say that the prices charged by theatre owners and sports promoters also required regulation; the legislature need not cover the whole field of possible abuses in order to render constitutional a more limited form of regulation. *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 649, 661 (1923).

That there have been and still exist abuses nobody doubts. Although Eugene O'Neill's "The Iceman

Cometh" has passed from Broadway and off-Broadway, the "iceman" still is a familiar behind-the-scenes figure on the Great White Way. The "ice" he carries, we are told, has not thawed and still represents the tribute paid by some brokers to box-office treasurers in return for allocations of a substantial portion of the choice seats for each performance. The brokers pass on the cost of such "ice" to their customers, in most instances businessmen accommodating out-of-town clients, and charge prices much higher than the box offices. The legislature and those knowledgeable in the circumstances believed the resultant effects of this situation, not only on those who must pay exorbitant rates to the brokers, but also on the typical theatre-goer and show business in general, cried out for legislative remedy. On the other hand, we are informed that the brokers play a vital role in the entertainment industry, for they sustain the second and third years of the run of a hit show and thereby bring to the industry the bulk of its profits. See J. Keating, "Theater Tickets: Is There a Basis for Hope?," New York Times, November 15, 1964, sec. 2, pg. 1. But the legislative solution in Section 169-c, while it may not entirely eliminate the grave abuses and may not be the perfect remedy, cannot be faulted as unreasonable. See *Kelly-Sullivan, Inc.* v. *Moss*, 180 Misc. 3 (1943); *Kelly-Sullivan, Inc.* v. *Moss*, 174 Misc. 1098, *aff'd*, 260 App. Div. 921 (1940).

Finally, there is no basis for claiming that the statute violates the equal protection clause because it is unfairly discriminatory. It is hornbook law that a person seeking to establish discrimination must show that he belongs to the same class as those allegedly receiving preferential treatment. *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937). Here the plaintiffs cannot meet that requirement. Section 169-c operates alike upon all ticket brokers, who certainly fall within a reasonably distinguishable class

from theatre owners and boxing promoters for purposes of state regulation. The ticket broker, for example, does not face the competitive hazards of running a theatre, producing shows, and making large capital investments.

We therefore hold that there is no basis for a permanent injunction or a declaration that Section 169-c is unconstitutional. The complaint is dismissed.

Dated: New York, New York
November 20, 1964

IRVING R. KAUFMAN
United States Circuit Judge

FREDERICK v.P. BRYAN
United States District Judge

LLOYD F. MACMAHON
United States District Judge

JUDGMENT OF THE COURT BELOW

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

64 Civ. 2717

Judgment

JOEY GOLD and NEW YORK TICKET BROKERS, INC., in behalf of itself and its members,

Plaintiffs,

—vs—

JOSEPH C. DICARLO, as Commissioner of Licenses of the City of New York, and LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,

Defendants.

A Three Judge Court having been convened, consisting of the Honorables Irving R. Kaufman, Circuit Judge, and Frederick v.P. Bryan and Lloyd F. MacMahon, United States District Judges, for the purposes of challenging the constitutionality of Section 169-c of the New York General Business Law and to enjoin defendants from enforcing or attempting to enforce the said Section and for a declaratory judgment to declare that statute unconstitutional under the Fourteenth Amendment of the Federal Constitution, and the Court having held a hearing thereon and having rendered its opinion on November 20, 1964, holding that no basis exists for a permanent injunction or

a declaration that the said Section is unconstitutional, it is therefor

ORDERED ADJUDGED AND DECREED that the defendants have judgment against the plaintiffs dismissing the complaint.

Dated: New York, N. Y.
November 20, 1964.

JAMES E. VALECHE
Clerk.

APPENDIX B

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT §1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK GENERAL BUSINESS LAW §167

"It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the appropriate political subdivisions of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

NEW YORK GENERAL BUSINESS LAW §169-c

"Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefore [sic] by such person, firm or corporation. Such person, firm or corporation shall likewise be

required to print or endorse thereon the maximum premium (not to exceed one dollar and fifty cents, plus lawful taxes), at which such ticket or other evidence of the right of entry may be resold or offered for resale. It shall be unlawful for any person, firm or corporation to resell or offer to resell such ticket or other evidence of the right of entry at any premium or price in excess of such maximum premium printed or endorsed thereon, plus lawful taxes, or so that the ultimate price to the purchaser of such ticket shall exceed a sum in excess of one dollar and fifty cents over and above the original price charged for admission as printed on the face of each such ticket or other evidence of the right of entry, plus lawful taxes."

APPENDIX C

THE NEW YORK TIMES, OCTOBER 8, 1964

Page 48, Column 1

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THE NEW YORK TIMES
OCTOBER 8, 1964

UNRESTRICTED FEE ON TICKETS SOUGHT

Lefkowitz Panel Would Let Broadway Brokers Set It

By SAM ZOLOTOW

The elimination of the statutory limit of $1.50 on premiums charged for tickets by Broadway brokers was recommended at a meeting of Attorney General Louis J. Lefkowitz's advisory committee on the legitimate theater yesterday.

The meeting, in Mr. Lefkowitz's office at 261 Madison Avenue, was closed, and the Attorney General declined afterward to identify those who advocated the repeal. He said, however, that representatives of theater owners present at the meeting were in accord with the proposal and were told to submit a plan.

Mr. Lefkowitz said he himself supported the step because he wanted to stop the sale of tickets to hit shows at exorbitant prices in the black market. One way of doing it, he continued, is to have "a free market in tickets unrestricted by the $1.50 premium."

Two unsuccessful attempts were made by ticket brokers in the last five years to remove the premium limit through legislation. At one time, they were joined by the League of New York Theaters, the organization of producers and theater owners.

The brokers sought to have the limit removed for one or two years to ascertain how it would affect the ultimate cost of tickets. Actors Equity fought the measure, and it was defeated in Albany.

The fee of $1.50, raised from $1.25, was adopted by the State Legislature in 1959.

Among those at the meeting were Angus Duncan, executive secretary of Equity; Russel Crouse, playwright; Robert Whitehead, producer; Paul Libin, president of the League of Off Broadway Theaters; Morris Ernst and Alan U. Schwartz, lawyers representing theatrical interests.

Also, Irving Cheskin, executive director of the League of New York Theaters; David

"B"

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Also, Irving Cheskin, executive director of the League of New York Theaters; David Clurman, an assistant attorney general; Gerald Schoenfeld and Bernard Jacobs, lawyers for the Shubert organization, which operates 17 of Broadway's 35 theaters and owns a half interest in the Music Box.

"B"

OFFICE OF PRICE STABILIZATION

WASHINGTON

TITLE 32A—NATIONAL DEFENSE, APPENDIX

Chapter III—Office of Price Stabilization, Economic Stabilization Agency

[General Overriding Regulation 14, Amdt. 3]

GOR 14—EXCEPTED SERVICES

ADDITIONAL EXCEPTED SERVICES

Pursuant to the Defense Production Act of 1950 (Pub. Law 774, 81st Cong.), as amended, Executive Order 10161 (15 F. R. 6105), and Economic Stabilization Agency General Order No. 2 (16 F. R. 738), this Amendment 3 to General Overriding Regulation 14 is hereby issued.

STATEMENT OF CONSIDERATIONS

This Amendment 3 to General Overriding Regulation 14 extends the list of exemptions contained in that regulation to include certain others which are deemed to have slight effect upon the cost of living or which cannot be practicably controlled.

Falling into the first named category are cemetery rates, fees and charges of religious or charitable organizations or of cemetery companies exempt from Federal income taxes under section 101 (5) and (6) of the Internal Revenue Code. Interment and cremation services in such cemeteries are performed at cost and in many instances at an actual loss. The average number of employees of non-profit cemeteries is small and they are hard to replace. Recognizing a lag in cemetery wage rates, the Wage Stabilization Board has by its general Regulation No. 7 exempted these organizations and companies from wage controls under certain circumstances. It is now deemed advisable to exempt their cemetery activities from price stabilization.

Section 3 (a) (72) of General Overriding Regulation 14, as established by amendment 2 thereto, provides for the exemption of dues and assessments of non-profit clubs and associations which do not have a business or trade purpose. When these clubs and associations combine non-profit purposes with general or trade purposes, their dues and assessments for these purposes are too general in their application and consequently difficult to control. When, however, such organizations have a specific as well as a general business or trade purpose and their dues and assessments are set for

gradually giving way to the competition provided by other lighting systems. The servicing of a gas lighting system has, therefore, become a specialty performed almost exclusively by municipalities and public utilities or by a limited number of private companies. Because of these factors such services are exempted by this regulation.

Section 3 (a) (89) of General Overriding Regulation 14, as established by amendment 2 thereto, provides for the exemption of services supplied directly by the States and their political subdivisions and municipalities, among others, but does not extend to the rates, fees or charges of persons supplying such services in a private capacity for any such government or governmental agency. A new section is added to General Overriding Regulation 14, as amended, which provides that where the seller of an article must by law collect taxes for a State or municipality and the law permits such seller to retain a portion of such tax money for his own use, the amount of tax money retained by the seller is exempt from ceiling price regulation.

Section 3 (a) (21) of this General Overriding Regulation exempts educational services rendered in the educational facilities of schools and educational institutions which provide a systematic and supervised course of instruction in a branch of knowledge, art, craft or skill. This exemption was not intended to extend to the rates, fees or charges for other than educational services rendered in schools and educational institutions. Thus, their sports and entertainment activities, such as school fairs, or field and athletic events were not exempt. These sports and entertainment activities are, however, in general a necessary adjunct to the educational services supplied by such schools and institutions. Section 3 (a) (21) is, therefore, hereby amended to provide for an exemption for these activities.

Subparagraph (84) of paragraph (a) of section 3 to this General Overriding Regulation is amended to clarify its application. This provision is intended to exempt real estate appraisers and the sales and rentals of real property by real property brokers and agents. These services are not only varied and complex but in addition the prices or rentals of real property enjoy statutory exemption from price stabilization. Transac[illegible] otherwise affecting real estat[illegible]

riding Regulation 14 was prepared after the Director of Price Stabilization had further consulted with industry representatives in various fields including trade association representatives, and had given consideration to their recommendations.

AMENDATORY PROVISIONS

General Overriding Regulation 14, as amended, is further amended in the following respects:

1. Subparagraph (21) of paragraph (a) of section 3 is amended to read as follows:

(21) Educational, sports and entertainment services rendered by, and in the facilities of, schools and educational institutions which provide a systematic and supervised course of instruction in a branch of knowledge, art, craft or skill.

2. Subparagraph (72) of paragraph (a) of section 3 is amended to read as follows:

(72) Dues and assessments of clubs and associations, organized and operated exclusively for social, recreation and other non-profit purposes (unless such purposes are combined with a specific business or trade purpose) no part of the earnings of which inures to the benefit of any private shareholder, except when such dues and assessments are in whole or in part charged for the rendering of a specific service of services. Dues and assessments of clubs and associations having a specific business or trade purpose, except automobile clubs, even though they could otherwise qualify for an exemption under this paragraph are not included within this exemption.

3. Subparagraph (84) of paragraph (a) of section 3 is amended to read as follows:

(84) Real property appraisers; and the rates, fees and charges for the sale or rental of real property by real property brokers and agents, other than management agents for real property.

4. Paragraph (a) of section 3 is amended by adding at the end thereof the following:

(91) Cemeteries which are operated by religious or charitable organizations or by cemetery companies, exempt from Federal income taxes under section 101 (5) and (6) of the Internal Revenue Code.

(92) Services rendered in connection with the repair, rental and maintenance of public street gas lighting equipment.

(93) State or municipal tax monies col[illegible] purch[illegible]

APPENDIX

Chapter III—Office of Price Stabilization, Economic Stabilization Agency

[General Overriding Regulation 14, Amdt. 3]

GOR 14—Excepted Services

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Section 3 (a) (72) of General Overriding Regulation 14, as established by amendment 2 thereto, provides for the exemption of dues and assessments of non-profit clubs and associations which do not have a business or trade purpose. When these clubs and associations combine non-profit purposes with general or trade purposes, their dues and assessments for these purposes are too general in their application and consequently difficult to control. When, however, such organizations have a specific as well as a general business or trade purpose and their dues and assessments are used for such a specific as well as a general business or trade purpose, then such dues and assessments are and will continue to remain subject to price stabilization. However, automobile clubs and associations, while they do have a specific business purpose, are because of their minor effect upon the cost of living by this amendment specifically excepted from the bar of that subparagraph.

Street lighting systems dependent on gas are not only few in number but are provided by other lighting systems. The servicing of a gas lighting system has, therefore, become a specialty performed almost exclusively by municipalities and public utilities or by a limited number of private companies. Because of these factors such services are exempted by this regulation.

Section 3 (a) (89) of General Overriding Regulation 14, as established by amendment 2 thereto, provides for the exemption of services supplied directly by the States and their political subdivisions and municipalities, among others, but does not extend to the rates, fees or charges of persons supplying such services in a private capacity for any such government or governmental agency. A new section is added to General Overriding Regulation 14, as amended, which provides that where the seller of an article must by law collect taxes for a State or municipality and the law permits such seller to retain a portion of such tax money for his own use, the amount of tax money retained by the seller is exempt from ceiling price regulation.

Section 3 (a) (21) of this General Overriding Regulation exempts educational services rendered in the educational facilities of schools and educational institutions which provide a systematic and supervised course of instruction in a branch of knowledge, art, craft or skill. This exemption was not intended to extend to the rates, fees or charges for other than educational services rendered in schools and educational institutions. Thus, their sports and entertainment activities, such as school fairs, or field and athletic events were not exempt. These sports and entertainment activities are, however, in general a necessary adjunct to the educational services supplied by such schools and institutions. Section 3 (a) (21) is, therefore, hereby amended to provide for an exemption for these activities.

Subparagraph (84) of paragraph (a) of section 3 to this General Overriding Regulation is amended to clarify its application. This provision is intended to exempt real estate appraisers and the sales and rentals of real property by real property brokers and agents. These services are not only varied and complex but in addition the prices or rentals of real property enjoy statutory exemption from price stabilization. Transactions otherwise affecting real estate, however, are not so exempt. Likewise, it is intended that services other than the selling or rental of real property by real property brokers and agents are and continue to be subject to ceiling price regulation. In particular, real estate management services by whomsoever rendered fall without the exemption provided by this regulation.

This amendment to the amended list of exemptions provided in General Overriding Regulation 14 has been issued after the Director of Price Stabilization had further consulted with industry representatives in various fields including trade association representatives, and had given consideration to their recommendations.

AMENDATORY PROVISIONS

General Overriding Regulation 14, as amended, is further amended in the following respects:

1. Subparagraph (21) of paragraph (a) of section 3 is amended to read as follows:

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(72) Dues and assessments of clubs and associations, organized and operated exclusively for social, recreation and other nonprofit purposes (unless such purposes are combined with a specific business or trade purpose) no part of the earnings of which inures to the benefit of any private shareholder, except when such dues and assessments are in whole or in part charged for the rendering of a specific service or services. Dues and assessments of clubs and associations having a specific business or trade purpose, except automobile clubs, even though they could otherwise qualify for an exemption under this paragraph are not included within this exemption.

3. Subparagraph (84) of paragraph (a) of section 3 is amended to read as follows:

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(91) Cemeteries which are operated by religious or charitable organizations or by cemetery companies, exempt from Federal income taxes under section 101 (5) and (6) of the Internal Revenue Code.

(92) Services rendered in connection with the repair, rental and maintenance of public street gas lighting equipment.

(93) State or municipal tax monies collected from purchasers to the extent such monies are retained pursuant to law by sellers of commodities and services.

(Sec. 704, 64 Stat. 816, as amended; 50 U. S. C. App. Supp. 2154.)

Effective date. This amendment 3 to General Overriding Regulation 14 shall be effective November 10, 1951.

MICHAEL V. DISALLE,
Director of Price Stabilization.

NOVEMBER 5, 1951.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 901

JOEY GOLD and NEW YORK TICKET BROKERS, INC., on behalf of itself and its members,

Appellants,

v.

JOSEPH C. DI CARLO, as Commissioner of Licenses of the City of New York, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

LOUIS J. LEFKOWITZ
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State of New York
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 901

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Appellants,

v.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellee, Louis J. Lefkowitz, Attorney General of the State of New York, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the three-judge District Court be affirmed or in the alternative that this appeal be dismissed.

Statutes Involved

Sections 167, 169-c of Article X-B of the General Business Law of the State of New York; United States Constitution, Fourteenth Amendment, § 1, the text of which is set forth in Appendix B of appellants' Jurisdictional Statement.

Questions Presented

1. Is the State of New York, under the theory of *res judicata*, precluded from regulating the re-sale price of theatre and sports tickets (General Business Law § 169-c) because the 1927 decision of *Tyson and Brother* v. *Banton*, 273 U. S. 418 has not been specifically overruled, despite the fact that the fictional test of the standard set forth in that case, i.e.—in order for a state to regulate business it must be "affected with a public interest"—has since been rejected by innumerable subsequent decisions of this Court starting with *Nebbia* v. *New York*, 291 U. S. 502 (1934), and most recently *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963), all clearly holding that the philosophy or test as stated in *Tyson* has been completely abandoned and repudiated by this Court?

2. Does the method of regulation of the re-sale price of sports and theatre tickets, as embodied in § 169-c of the General Business Law of the State of New York, bear a rational relation to the constitutionally permissible legislative purpose expressed in § 167 of the General Business Law?

Statement of the Case

The State of New York, through § 169-c of Article X-B of the General Business Law, regulates the price at which licensed brokers may re-sell tickets to theatres and other places of public amusement. This section makes it unlaw-

ful to re-sell a ticket to any theatre, sporting event or other public amusement event at a price more than $1.50, plus lawful taxes, in excess of the maximum price printed on the ticket.* The legislative purpose, expressed in § 167 of Article X-B of the General Business Law, declares that the admission price for public amusement is "a matter affected with a public interest" and is subject to supervision and regulation to safeguard the public "against fraud, extortion, exorbitant rates and similar abuses."

Appellant, Joey Gold,** a licensed ticket broker and appellant, New York Ticket Brokers, Inc., a membership corporation of licensed brokers, sought to enjoin appellees from enforcing § 169-c against ticket brokers and also sought a declaratory judgment that the statute is unconstitutional under the Fourteenth Amendment of the federal Constitution.

In 1927, this Court, in *Tyson and Brother* v. *Banton*, 273 U. S. 418 held that the State of New York lacked power to regulate re-sale prices of theatre and sporting events

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* The statute involved in *Tyson* set a ceiling of 50¢. This was repealed by Laws of 1937, Ch. 699, following *Tyson*. The Laws of 1940, Ch. 614, Section 1, the Legislature re-enacted legislation fixing a ceiling of 75¢; in 1954 the ceiling was raised to $1.00 (L. 1954, Ch. 94); in 1957 the ceiling was raised to $1.25 (L. 1957, Ch. 648); and in 1960 the present statute was enacted by the Laws of 1960, Ch. 902 raising the ceiling to $1.50.

** In a supplemental affidavit to the complaint, appellant Gold indicated that proceedings had been instituted by the District Attorney of New York County against him and other brokers for violation of Section 169-c of the General Business Law. In fact, an information had been filed against appellant Gold in the Criminal Court of the City of New York, County of New York charging him with violation of Section 169-c. Subsequent to the disposition by the Three Judge Court in this case, this appellant Gold, on December 8, 1964, pleaded guilty to four counts of the aforesaid information. This followed an extensive theatre investigation conducted by the State as a result of which additional legislation was enacted regulating theatrical syndication financing (L. 1964, Ch. 728, Section 1, eff. June 1, 1964; now General Business Law, Article 26-A, McKinney's Consol. Laws of New York, Book 19).

tickets because they were not deemed by this Court to be matters "affected with a public interest" and thereupon declared unconstitutional the predecessor of present § 169-c. The appellants contend that since the *Tyson* case has never been explicitly overruled the merits of that decision may not be challenged because, under the doctrine of *res judicata*, the Attorney General of the State of New York is bound by that holding (6-9).***

Appellants in also challenging the constitutionality of § 169-c do not question the power of the Legislature to legislate in this area, but contend that the provisions of 169-c are not reasonably related to the legislative purpose set forth in § 167 and is discriminatory against theatre ticket brokers, thereby violating the Fourteenth Amendment of the Constitution (11). Nor do they question that the Legislature had before it evidence of abuses in the distribution and sale of tickets for public amusement performances (11).

Opinion Below

The Court below rejected both positions taken by appellants. It held that the *res judicata* argument must fall because the philosophy of *Tyson* has been so completely repudiated that the Court would be abdicating its judicial responsibility if it were now to follow *Tyson* merely because the words, "we hereby overrule *Tyson*" were not specifically and expressly used by this Court in its subsequent decisions which rejected the "fictional test" originally expounded in *Tyson*. Quite correctly, it is submitted, the Court below characterized *Tyson* as an "illusory barrier". As the Court pointed out, "in the constitutional area the considerations of finality that stand behind the *res judicata* doctrine must be balanced against and oftimes give way

*** Figures in parentheses refer to pages in appellants' jurisdictional statement unless otherwise indicated.

to government's need to regulate abuses that change with the passage of time".

With equal clarity the Court below rejected appellants' challenge to the statute as being violative of the Fourteenth Amendment. In so doing the Court did nothing more than follow the well established principle so often enunciated by this Court that the courts no longer resort to the due process clause as a weapon "to strike down state laws, regulatory of business * * * conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955)". The Court interpreted the declaration of purpose as stated in § 167 to be an expression of legislative concern with a price the public *ultimately* pay for theater tickets and concluded that it was for the Legislature to determine the most effective method of accomplishing its objective. Thus, if the Legislature thought that the whole field of possible abuses need not be covered, it is not for the Court to say that other areas must also be regulated.

Finally, in addressing itself to the charge of unfair discrimination the Court once again followed well established Hornbook law that in order to establish discrimination one must show that he belongs to the same class as those allegedly receiving preferential treatment. *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937). It was found that appellants could not meet this requirement since § 169-c operates alike upon all ticket brokers who clearly fall within a reasonably distinguishable class.

ARGUMENT

No substantial federal question is presented by this appeal.

A

"The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of the court so as to foreclose the subject". It is difficult to conceive of a more appropriate statement of the principle applicable to the case at bar than the aforementioned quotation from *California Water Service Co.* v. *Redding*, 304 U. S. 252, decided by this Court in 1938.

The 1927 5 to 4 decision of *Tyson and Brother* v. *Banton*, 273 U. S. 418 (1927) invalidated a legislative attempt to control the re-sale price of tickets in New York State. The majority opinion stressed the fact that price fixing is proper where the business or property involved has become "affected with a public interest". The Court held that the re-sale of theater tickets was not a business affected with the public interest and was therefore, not subject to price control. Mr. Justice Holmes dissented, stating that "the Legislature may forbid or restrict any business when it has a sufficient force of public opinion." This dissent has since become the law.

Following the *Tyson* decision the statute therein involved was repealed by the New York Legislature. What is being challenged here is a new statute enacted years later in 1940 following the later pronouncements by this Court. The 1940 statute presently before this Court was the subject of challenge in the state courts in *Kelly—Sullivan* v. *Moss*, 174 Misc. 1098 (1940), 22 N.Y.S. 2d 491, aff'd 260 App. Div. 921 (1st Dept., 1940), 24 N.Y.S. 2d 984 and *Kelly—Sullivan, Inc.* v. *Moss*, 180 Misc. 3 (1943), 39 N.Y.S. 2d 797. There the Court, on two occasions, rejected the attack

predicated principally in reliance upon the *Tyson* case passing upon the earlier statute and held the 1940 statute constitutional.

Reference need be made to but a few cases of the many decided by this Court in this area to show that *Tyson* has been so effectively overruled as to make any reliance on it devoid of any possible merit. In *Nebbia* v. *New York*, 291 U. S. 502 (1934) this Court upheld the authority of the states in the exercise of police power to fix rates, prices and commissions and held that the regulations by the State of New York of the price of milk was consistent with the Fourteenth Amendment. As the Court below indicated, *Tyson's* fictional test was rejected in *Nebbia*. The approval of the doctrine in *Nebbia* was reaffirmed in *Olsen* v. *Nebraska*, 313 U. S. 236 (1941) which referred to both *Ribnik* v. *McBride*, 277 U. S. 350 (1928) and *Tyson*, stating in effect that the principle enunciated in *Tyson* no longer applies.

Many cases followed wherein this Court rejected *Tyson* and reaffirmed the principle of *Nebbia* and *Olsen*. However, to complete a trilogy we advance to 1963 and the case of *Ferguson* v. *Skrupa*, 372 U. S. 726. There, in its discussion of the due process clause, this Court noted that there was a time when the due process clause was used to strike down laws incompatible with some economic or social philosophy, citing *Tyson* and the Holmes dissent. However, the Court continued, the cases make it clear that the doctrine of due process authorizing courts to hold laws unconstitutional when they believe the Legislature has acted unwisely has long since been discarded and the courts are no longer concerned with either the wisdom or need or appropriateness of the legislation.

It is submitted that in such posture the insubstantiality of the alleged due process question is clear beyond doubt. In light of the foregoing it is inconceivable that appellants would suggest to this Court, at this late date, that until

Tyson is specifically overruled it is to be deemed controlling in this case. Similarly, the tenuous theory of *res judicata* relied upon by appellants is obviously without merit; indeed, it is frivolity of the plainest sort. The validity of the view of constitutional law enunciated by this Court on numerous occasions subsequent to *Tyson* and clearly applicable to the case at bar, is so firmly established as to be beyond plausible dispute. Appellants' reliance upon *Tyson* as controlling herein, under any theory, is entirely misplaced and the cases cited by them are not in point. More applicable is the long established principle that where subsequent decisions of the same court are not in harmony with prior decisions the later decisions have the effect of overruling the prior ones, even where not mentioned. See e.g., *Asher* v. *Texas*, 128 U. S. 129 (1888).

B

In view of the principles enunciated in the numerous cases decided by this Court in the area now under discussion, culminating in the broad declaration stated in *Ferguson* v. *Skrupa, supra*, it is untenable to suggest that the treatment by New York of the sale of amusement and sports tickets is arbitrary and that the provisions of the statute are not reasonably related to the legislative purpose. Such a contention fails to raise a substantial federal question since it is obviously entirely devoid of any merit. This is apart from the fact that the exact question was raised and the identical arguments were made, unsuccessfully in the two *Kelly-Sullivan* v. *Moss, supra*, opinions by the State court more than 20 years ago. In the absence of any change in court pronouncements, and there are none, favorable to appellants there can be no substantial question requiring or justifying review or re-examination at this time. In passing it should be noted that the challenge to the evils and abuses in this field were also dismissed in the pre-*Tyson* case of *People* v. *Weller*, 237 N. Y. 316 (1924), 143 N. E. 205, aff'd *sub nom. Weller* v. *New*

York, 268 U. S. 319 (1925), upholding *licensing* of theatre brokers.

The Legislature has expressly declared in Gen. Bus. Law, § 167 that the price of theather tickets "is a matter affected with a public interest and subject to the supervision of the appropriate political subdivisions of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rate and similar abuses". Such declaration, as *Ferguson* v. *Skrupa, supra,* holds is not to be questioned by a difference of opinion as to the efficacy or wisdom of the means devised by the Legislature to promote the public interest in this regard.

As that case holds, the time has passed when Courts will employ the Due Process or Equal Protection clauses of the Constitution to challenge state laws because such laws may be deemed unwise, improvident or out of harmony with a particular school of thought. See also *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955); *Day-Brite Light, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952); *Goesaert* v. *Cleary*, 355 U. S. 464, 467 (1948); *Daniel* v. *Family Ins. Co.*, 336 U. S. 220, 224 (1949); *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192 (1912); *Beauharnais* v. *Illinois*, 343 U. S. 250, 262 (1952). See, too: *Ticket Clubs of New Jersey, Inc.* v. *O'Connell*, 8 Misc. 2d 519 (Sup. Ct., N. Y. Co., 1957), 166 N.Y.S. 2d 294, aff'd 4 A. D. 2d 938 (1st Dept. 1957), 167 N.Y.S. 2d 1000, lv. to app. den. 5 A. D. 2d 767, 170 N.Y.S. 2d 977.

Since the statute in question encompasses the entire area of ticket sales, there can be no factual basis for even injecting a Fourteenth Amendment argument. The separate grouping of ticket resellers cannot be challenged as discriminatory. *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Assn., Inc.*, 360 U. S. 334 (1959); *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 151 (1938); *Goesaert* v. *Cleary, supra,* 335 U. S. 464 (1948); see also *Bowles* v. *Willingham*, 321 U. S. 503 (1944).

That the Legislature has not fixed the ceiling on the box office price of theater tickets furnishes no ground for arguing discrimination. The Legislature determined to deal only with the evils arising in the resale of tickets. It has been consistently held that the fact that the Legislature does not occupy the entire area raises no Fourteenth Amendment question. *West Coast Hotel Co.* v. *Parrish, supra,* 300 U. S. 379 (1937); *Four Maple Realty Co.* v. *Abrams,* 2 A. D. 2d 753 (2nd Dept., 1956), 153 N.Y.S. 2d 747 app. dism. 2 N. Y. 2d 837 (1957), 159 N.Y.S. 2d 976, 355 U. S. 14 (1957); *National Psychological Assn.* v. *University of State of New York,* 8 N. Y. 2d 197 (1960), 168 N. E. 2d 649, app. dism. 365 U. S. 298 (1961). (Note that in the Fair Trade cases the argument was also unsuccessfully made that the Legislature failed to control the price of the manufacture or wholesaler. *Old Dearborn Corp.* v. *Seagram Corp.,* 299 U. S. 183 (1936); *General Electric Co.* v. *Masters, Inc.,* 307 N. Y. 229 (1954), 120 N. E. 2d 802, app. dism. 348 U. S. 892 (1954). Nevertheless, the statute does require that the established price of the tickets (and the service charge by brokers) be posted on the ticket, so that there can be no discrimination. To that extent, the theatre owners too, are subject to restrictions under the statute. Whether based on Due Process or Equal Protection contentions, it is beyond plausible dispute that the constitutional challenge is wholly devoid of any colorable merit.

CONCLUSION

The District Court correctly determined the issues involved. This appeal presents no substantial constitutional question. The judgment should be affirmed or the appeal dismissed.

Dated: New York, New York, March 2, 1965.

Respectfully submitted,

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(37898)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 901

JOEY GOLD and NEW YORK TICKET BROKERS, INC., on behalf of itself and its members,

Appellants,

—against—

JOSEPH C. DICARLO, as Commissioner of Licenses of the City of New York, and LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

LEO A. LARKIN
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Appellee

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Appellees.

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, defendant-appellee Joseph C. DiCarlo, Commissioner of Licenses of the City of New York, moves that the judgment of the District Court be affirmed.

Statement

This is a direct appeal from an order entered on November 20, 1964, by a three-judge District Court dismissing the complaint. The opinion of the District Court is reported in 235 F. Supp. 817 and is set forth in Appendix A of the Jurisdictional Statement.

The action was brought to have declared unconstitutional § 169-c of the General Business Law of New York. That statute, set forth in Appendix B of the Jurisdictional Statement, provides that it shall be unlawful to resell a ticket

to a public amusement event at a price more than $1.50, plus taxes, in excess of the price printed on the face of the ticket. The effect of the statute is to limit the brokerage charge for tickets to $1.50.

The Decision Below

The opinion of the three-judge District Court, per KAUFMAN, C.J., held that § 169-c was within the power of the New York Legislature and that the means chosen to effect the legislative purpose—the regulation of broker's resale prices—was reasonable and constitutional.

Tyson & Brother v. *Banton*, 273 U.S. 418 (1927) held unconstitutional an earlier New York statute (old § 172 of the General Business Law) limiting the premium for resale of tickets to fifty cents on the ground that the state lacked power to regulate resale prices of theatre and sports tickets because they were not deemed by the Court to be matters "affected with a public interest." However, the test laid down in *Tyson* was rejected in *Nebbia* v. *New York*, 291 U.S. 502 (1934), which sustained a State statute fixing the minimum and maximum retail prices of milk; and *Olsen* v. *Nebraska*, 313 U.S. 236 (1941), which upheld a statute regulating fees of employment agencies; and in *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963) the opinion of Justice BLACK stated that *Tyson's* philosophy had been abandoned. Under the circumstances, the District Court held that *Tyson* was no longer a binding precedent and was not *res judicata* as to the issues here involved.

Considering the merits of the controversy apart from *Tyson*, the Court held that the method of regulation chosen by the Legislature was reasonably related to the expressed legislative purpose and should be upheld.

ARGUMENT

The appellant urges that *Tyson* has never been overruled, while conceding "that since that decision in 1927, the doctrine upon which it was based has been substantially eroded and that this Court in recent years has redefined the limitations on the power of a state to fix prices and regulate business to such an extent that few such restrictions remain." (Jurisdictional Statement, p. 7). Nevertheless, the appellants urge, *Tyson* should not be overruled with respect to the situation for which it was written.

We submit that this argument is without merit. If the rationale of *Tyson* no longer applies, there is no reason why its result should be continued with respect to another different, albeit similar, statute. The statute involved in *Tyson* was § 172 of the General Business Law which imposed a limitation of fifty cents on the premiums chargeable by ticket brokers. The limitation as to the amount of premium was repealed subsequent to the *Tyson* decision and the statute was renumbered as § 169-c (L. 1928, ch. 600). Section 169-c was amended in 1940 (L. 1940, ch. 614) so as to provide for a maximum brokerage charge of seventy-five cents. The statute was amended several times to increase the maximum brokerage fee. The last amendment imposed the present maximum of $1.50 (L. 1960, ch. 902). The validity of § 169-c has been upheld in two state court decisions *Kelly-Sullivan* v. *Moss*, 174 Misc. 1098, 22 N.Y.S. 2d 491 (1940), aff'd 260 App. Div. 921, 24 N.Y.S. 2d 984 (1st Dept., 1940) and *Kelly-Sullivan, Inc.* v. *Moss*, 180 Misc. 3, 39 N.Y.S. 2d 797 (1943). The fact that the present statute has not been challenged for over twenty years and ticket brokers have continued to operate thereunder distinguishes this case

from the baseball situation involved in *Toolson* v. *New York Yankees*, 346 U.S. 356 (1953), relied upon by appellants (Jurisdictional Statement, pp. 7-8).

The appellants further urge that § 169-c is not reasonably designed to achieve the expressed legislative purpose of controlling prices to be paid for tickets since it limits the permissible charges by brokers but does not impose any limitation on the box-office prices which may be fixed by theatrical producers or sports promoters.

The answer to the foregoing contention is that § 169-c is not rendered invalid merely because it does not attempt to regulate every aspect of ticket selling. *Goessert* v. *Cleary*, 335 U.S. 464 (1948); *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 661 (1923).

Ticket brokers are a recognizable class which may reasonably be distinguished from other groups engaged in the theatrical or sports industry, such as producers, promoters, etc. Section 169-c applies alike to all ticket brokers. The prices charged by ticket brokers obviously bear some relationship to the ultimate price paid by the public for tickets and the regulation of brokerage charges thus bears a relationship to the expressed legislative interest in "the price of or charge for admission to theatres, places of amusement or entertainment" (§ 167 of General Business Law, Jurisdictional Statement, p. 24). Whether the particular method adopted by the Legislature is the one best designed to meet the evil sought to be curbed is not a question open for judicial review.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The order of the three-judge District Court should be affirmed.

March 4, 1965

Respectfully submitted,

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IN THE

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

This memorandum is devoted to the arguments advanced by defendant-appellees on the question of whether the statute here under attack meets the constitutional test of reasonableness, *i.e.*, whether its provisions are reasonably related to the accomplishment of the stated legislative objective. We believe that those arguments miss the point.

They urge that the right to enact legislation controlling the resale prices of tickets of admission is within the power of the legislature. We do not deny that this may be so.

They further urge that the legislature is not required to legislate with respect to every area of a field, but may choose selected areas in which to legislate. We believe that this is true and we in no way dispute it.

The point is that these arguments are not relevant. That the executory provisions of a statute would be reasonable and appropriate to the accomplishment of some other legislative objective which might be within the power of the legislature to enact (but which it chose not to enact), does not enable them to survive the test of whether they bear such a reasonable and useful relationship to the stated objective of the statute which the legislature actually did enact.

The Legislature of the State of New York could have decided that the difficulties in theatre ticket distribution in New York could be cured by legislation which had as its objective, control of the fees charged by ticket brokers. It clearly chose not to do so. It selected another remedy. It decided instead that the objective of its legislation was to control the ultimate price paid by the purchaser of the ticket. That is the objective against which the means provided for in the statute must be measured, in order to determine whether they are reasonably designed to accomplish the purpose.

The only expert testimony available; namely, the finding of the Office of Price Stabilization, referred to in the Jurisdictional Statement, holds that the means here chosen are not reasonably and adequately related to the objective; namely, control of the ultimate price paid by the purchaser.

This we believe, is the point which the arguments in support of the motion to dismiss fail to comprehend and it follows that there is a substantial issue to be considered.

Dated: New York, New York, April 8, 1965.

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